Volume 69
Issue 3 *Dickinson Law Review - Volume 69, 1964-1965*

3-1-1965

Book Review

BOOK REVIEW

THE LAW PRACTICE OF ALEXANDER HAMILTON, DOCUMENTS AND COMMENTARY. Volume I, Julius Goebel, Jr., editor; Francis K. Decker, Jr., Hugh M. Dougan, Dorothy Burne Goebel, Paul E. Roberts, and Winnifred Bowers, associate editors. William Nelson Cromwell Foundation and Columbia University Press, New York and London, 1964, 898 pages. Price: $18.50.

The late Felix Frankfurter wrote that historians and lawyers failed to appreciate the intermeshing of their disciplines in this country's history.[1] So, too, do the other fields of study miss a significant factor in this nation's development when they fail to take into account the impact of practicing attorneys upon our law and the development of legal principles and their application.[2] That the study of man is man is a cliché equal to the art of writing is to write; but it certainly is, unfortunately, not equally so that the study of law, lawyers, and judges is the study of this nation. Would that it were such a cliché, for this would imply what every legal historian feels and espouses. For example, in a constitutional democracy such as ours, did and do lawyer-Presidents, legislators, and judges[3] so influence the nation that their backgrounds and lives become of significance in understanding the past development of the country? This rhetorical question should highlight the lack of works in this area, *e.g.*, what was the effect of his legal background upon the way in which Franklin Roosevelt viewed his powers and his functions and, more importantly, exercised them? Similarly, what was the effect of a lack of such a legal background in Eisenhower, Truman, and others? Or, in a sort of in-between aspect, how did Woodrow Wilson's political science background aid or hinder him? The legal historian has long been aware of these interactions and, to the extent that historians,[4] political scientists,[5] and others understand and apply them, then at least to that extent will our comprehension of past America be furthered.

1. MR. JUSTICE HOLMES AND THE SUPREME COURT 3 (1938).

2. See, *e.g.*, the excellent study by TWISS, LAWYERS AND THE CONSTITUTION (1942), a political scientist who discloses the influence of practitioners upon the interpretation given by the Supreme Court to the 14th Amendment in the 19th Century.

3. It is not constitutionally a requirement that Justices of the Supreme Court, for example, be lawyers, or have studied law; the most recent analogy, but not example, is, of course, the late Mr. Justice Jackson who studied law for one year, then "read" law and was admitted to practice.

4. See, *e.g.*, MORRIS, STUDIES IN THE HISTORY OF AMERICAN LAW (2d ed. 1959).

5. See, *e.g.*, LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW (1957), Wormuth and Mirkin, *The Doctrine of Reasonable Alternative*, 9 UTAH L. REV. 254 (1964).

Legal historians are in the forefront of this effort but their ranks are too few[6] and their efforts are not many. The Association of American Law Schools either has discontinued its section on legal history formerly held periodically at its conventions, or else there is a dearth of interest; the American Society for Legal History is still lacking in numbers and in publications;[7] and the Journal of Legal History still finds difficulty in rounding out its contents.[8] It is therefore almost by default, and perhaps by necessity, that individuals still dominate the field of legal history. But this is not to say that it is only from individuals that volumes will come. To the contrary, the tendency, albeit not yet trend, seems to be either a collective or a collaborative research, as witness the forthcoming volumes under the Holmes Devise, and the instant volume here reviewed. Whether or not future studies of legal matter and institutions and figures will require sponsorship or cooperation or both is moot; the conjunction, however, is a consummation to be desired.

For the fruits of such a consummation are illustrated in this Law Practice volume. And the tree has born good fruit. There are too few biographies of legal figures, which may well be a task for present and future biographers,[9] and too few studies of the after-lives of public figures, which command attention as unfinished business. For example, Dewey and Nixon come to mind as presidential candidates who, in their earlier careers, contributed greatly to the American scene; today, as private practitioners, do they still contribute? And if so, in what manner and to what extent? Or, in the case of presidential non-lawyers, Truman and Eisenhower may well be so examined, as can Hoover, by political scientists. So may such figures in the past be studied, and for legal historians and lawyers the legal careers of such

6. See, *e.g.*, Re, *Legal History Courses in American Law Schools*, 13 AM. U. L. REV. 45 (1963). Prof. Re undertook this study at the suggestion of this writer, then national president of the American Society for Legal History, and his article is the most definitive study of today's courses in this subject in American law schools, their content and their descriptions.

7. The predecessor of the Society published one volume, Edsall, ed., THE JOURNAL OF THE COURTS OF COMMON RIGHT AND CHANCERY OF EAST NEW JERSEY, 1683 TO 1702 (1937), and the present Society has published ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND (Bobbs-Merrill Co., Indianapolis 6, Ind., 1962); a forthcoming volume, edited by this writer, ESSAYS IN LEGAL HISTORY IN HONOR OF FELIX FRANKFURTER (1965, Bobbs-Merrill), completes the picture. However, as offshoots from Branch Conferences in past years, about a dozen law review articles have been credited to the Society.

8. *E.g.*, the publication of Labor History, beginning in 1960, has drawn some articles from either legal or history publications.

9. The great ones, of course, are well covered, but it is of the lesser figures, who nevertheless influenced the development of (law in) America, that we write. Doctoral candidates in law, history, political science, etc. might well examine this unplowed field. See in addition to the present volume under review, the forthcoming three-volume legal papers of John Adams, being edited by Zobel and Wroth and to appear later this year.

great and lesser public figures is of great interest. And in choosing the legal practice of Alexander Hamilton as the base upon which to understand the impact of this lawyer in this area, Goebel & Co. have done well. As Judge Proskauer writes in his Foreword to the volume, in this respect we may "describe one of the primary and most potent influences of Alexander Hamilton, the lawyer, on our national history."

To understand Hamilton, the lawyer, Professor Goebel (and his confréres) has proposed to edit two volumes of his pleadings, briefs, memoranda, oral arguments, and other papers. Thus original documents, albeit slightly edited as required, are the backbone of these volumes, the first of which is now published and here reviewed. But, instead of giving merely the raw data, which is some instances may well result in the reader's incorrect conclusions, if not outright error, concerning Hamilton, the editors have arranged the volume excellently and from the point of view of the uninitiated lawyer. First, therefore, we write concerning these procedural details, and then on the volume's contents.

The Foreword, the Preface, and the Acknowledgments are not of present moment although, in his Preface, the chief editor writes that Hamilton's "business, of course, involved the fortunes of his fellow men, stands inextricably woven into the fabric of their society." Thus, for an understanding of such a law practice, and "To view the documents . . . in an approximation of the atmosphere in which they were conceived . . . , these, wherever possible, should be related to the life of the times, and to the immediate circumstances which evoked them." In so relating and viewing the documents many sources had to be tapped, and in a preliminary "Editorial Detail" section the procedures as to the documents and sources are given.[10] The method of presenting the documents makes therefore a necessity the first essay on "The Law and the Judicial Scene" in which, as it were, Professor Goebel sets the scene for what is to follow. In these thirty-five pages the office and law methods of Hamilton are examined in the light of contemporary practice, his legal background is culled from the circular letter concerning his missing books which he sent out in 1795 when he returned to the practice of law, and the local and national aspects bearing upon the fitting in of Hamilton's legal career are somewhat told. In effect Goebel here also gives us a somewhat condensed discussion of the judicial system and practice in colonial New York, which he previously has done,[11] but now related primarily to the Hamilton law practice so as to highlight the documents and cases which then

10. Parenthetically, we may also observe that beginning with page 849 an extensive listing of the known volumes and material in Hamilton's library is given, and beginning with page 869 (to 898) a comprehensive index is found.

11. GOEBEL & NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK (1944).

are to be given. Taken separately this preliminary essay not only is of great value to the reader but, insofar as scholarship is concerned, definitely sets the pattern for the rest of the volume.

There are five divisions in this first volume, namely: the preliminary essay just discussed; practice and procedure; the war cases; interstate boundary disputes; and the criminal cases. The second practice division was in charge of Roberts; the third was shared by Goebel, Decker, Dougan, and Bowers; the fourth by Decker and Mrs. Goebel; and the last by the Goebel "team." Each division, nevertheless, follows a somewhat set pattern, namely, a preliminary discussion which discloses the background into which each document, etc. fits, and provides a frame to set off this picture of Hamilton's practice. Thus the practice division opens with such a discussion concerning New York Supreme Court (pp. 37-54) and Chancery (167-183) procedure, as does that on the war cases (197-223), interstate boundary (545-552), and the criminal cases (685-692). But this reader should not feel that, without more, Hamilton's diaries, documents, notes, etc. are then given. For example, even though the first practice portion goes directly into Hamilton's own "text," there are "Editor's Notes" (63-69) and voluminous footnotes which cast much light upon the material given; so, too, do the war cases have additional discussions on each of their subdivisions, and the other major volume divisions do this also. In other words, the editors have not merely assembled; nor have they merely edited; nor have they even merely introduced. What is given in this first volume is a definitive analysis and treatment of all facets concerning the raw material set forth. There is thus adumbration, interpretation, and, of even greater importance, comprehension; comprehension, that is, of Hamilton as the practitioner, which permits appreciation of Hamilton as the politician and the writer of a goodly portion of The Federalist essays. One reads this volume with The Federalists in mind, and one sees, especially in his "points" and his briefs, the logical approach which, in Federalists Nos. 78 and 81, disclose views which Marshall later utilized on judicial review and other matters.[12]

Of the four documentary divisions in the volume the first, on practice and procedure, is mainly of interest to those who seek to interpret the British-American interacting influences which resulted in the New York procedure; it is highly conjectural, even speculative, to opine that Hamilton influenced even slightly the New York Field Code of 1846 which set the pace and the tone for American jurisdictions thereafter, but it is not too wild a surmise that Hamilton's practice manual and notes did aid in the judicial indoctrination of those readers and apprentices who later surged to the fore in so

12. See, *e.g.*, Marbury v. Madison, 1 Cr. 137, 2 L. Ed. 60 (1803).

regularizing procedure. This procedural text, not heretofore published, gives an excellent summation of then New York practice, and while of little practical aid to the lawyer of today, it does permit an appreciation of Hamilton as an innovator and a legal statesman. For example, New York has just undergone a refurbishing of its civil procedure, and the concept is apparently thought to be recent, that is, that substance prevails over procedural form. And yet, here in the 18th century, is what Hamilton wrote (concerning pleas):

> Formerly there was a great deal of nice Learning about Pleas in abatement, which is now in Little Estimation and indeed the Pleas themselves are seldom used; and are always discountenanced by the Court, which having lately acquired a more liberal Cast begin to have some faint Idea that the end of Suits at Law is to Investigate the Merits of the Cause, and not to entangle in the Nets of technical Terms . . . .[13]

At the conclusion of Hamilton's practice manual is found a series of thirty-one forms, beginning with the institution of a cause of action and going into the final judgment, bill of costs, and executions (136-166). These are of current value only to the legal historian, but their inclusion testifies to the thoroughness of the editorial work. So, too, does the subdivision on chancery procedure so testify. Here the introduction and the forms are, compared to the preceding, somewhat less, but they are still rather complete. The editors at once disclose that Hamilton "left no work similar to Practice Proceedings [the practice manual] to describe the very different procedure which was employed in New York's single court of equity" (167), but the introduction portion develops this briefly and somewhat completely; perhaps, it may be added, even too completely for the purpose of the volume, for Hamilton as a lawyer is overshadowed (see esp. 178-183). But this criticism, if it is misunderstood so to be, emphasizes the professional competence of the work.

The division on war cases is a delight to read. For although these were among the first lawsuits (approximately 65) Hamilton argued after beginning his practice, even though his reputation as an attorney (excellent) and as a British sympathizer (erroneous) were now enhanced, the documents disclose emerging facets of Hamilton's talents which later flowered and were brought to bear in the public's cause, *e.g.*, his defense of Croswell (of which more later). The introductory essay by the editors is rather comprehensive

13. At 81. At 38 the editors disclose the influence of this practice manual upon, for example, Wyche's 1794 published volume. It is also intriguing to note a bill of costs in *Davenport v. Thomas*, at the foot of which appears: "New York March 9th. 1789 Received from Aaron Burr Esquire the amount of the foregoing bill of Costs—Alexander Hamilton" pp. 160-61.

as to the three New York anti-loyalists statutes which confiscated and forfeited those who had "adhered to the Enemies" (197), *i.e.*, the colonists who had sided with England and who still remained in the country; permitted debtors to cite their (Loyalist) creditors and provided a procedure whereby payment might be made, as well as staying suits for debts, both of which aided patriots; and, third, the Trespass Act of 1783, which provided many of the cases in which Hamilton became involved. "Where the Confiscation and Citation Acts were directed for the most part at wealthy men of property or the creditors of Patriots, the Trespass Act struck at all Loyalists regardless of their financial position . . . ." (200-201) These local acts had to be interpreted and applied in the light of the Treaty of Peace of 1783, ratified on January 14, 1784, and which appeared to be pro-Loyalist, at least insofar as it softened the impact of statutes such as those of New York upon the Loyalists. In other words, the New York Patriots sought to ignore or interpret the Treaty's provisions so as to leave untouched at least insofar as their impact was concerned, the New York anti-Loyalist laws; and, with democratic fervor, these Patriots inveighed against anyone who denied them their due. Hamilton's defense of the Loyalists was not restricted to *Rutgers v. Waddington*,[14] for thereafter he participated in about forty-four additional cases under the Trespass Act (419-543), but this case is given the longest and most comprehensive treatment (282-419), has a rather lengthy introduction (282-316), and was "a marker on the long road that led to the ultimate formulation of the American doctrine of judicial review [see The Federalist, No. 78]. It is likewise something of a landmark in Hamilton's life . . . ." (282) Separately treated under the Confiscation and Citation Acts are other cases (a few under the former, and nine under the latter), with introductory and explanatory comments illuminating the statutes, briefs, and arguments. In the light of today's views on the obligations of a lawyer to defend all accused, regardless of personal views, it may well be said that Hamilton early in our history exemplified well this modern "tradition."[15]

The *Rutgers* case, in this writer's opinion, vies with the *Croswell* case for honors in this collection. As heretofore disclosed, four of the six editors worked on these war cases, and only the Goebel team on the criminal cases (which includes the *Croswell* case), which itself is an indication of their per-

14. The opinion was privately printed in 1866, is also found in MORRIS, SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY, 1674-1784 (1935), and was also printed as a pamphlet in 1784. This last version is given in full at pp. 393-419 of the instant volume.

15. Of course he was paid, and of course he developed a practice, but Hamilton could still pick and choose. All this does not mean that Hamilton is here being exalted as a minor god; it does mean that he was a successful lawyer, with ideals, and that he did contribute to our legal heritage.

sonal views; furthermore, *Rutgers* occupies a total of about 130 pages, while *Croswell* takes about 75. Additionally, Hamilton engaged actively in sponsoring and arguing, as a member of the New York Assembly, for the passage of a bill repealing a portion of the Trespass Act which prohibited pleas of military justification (524), whereas in *Croswell* he was present only on the "appeal" and not in the legislative aftermath. Furthermore, after *Rutgers* there was a "further maturing" of Hamilton's mind, and in his defense of Harry Croswell this is well manifested.

The interstate boundary disputes involving New York were concerning four distinct areas, and Hamilton was directly involved in those with Massachusetts and with Connecticut. The New York-Massachusetts western lands dispute is given what is, to this writer, probably the finest condensed legal introduction extant, and the record includes what the editors term "a treasury of historical documents." (583) The case began without Hamilton, and amongst the group preparing the matter the main burden fell upon James Duane. Pressed by other duties Duane besought aid, and the New York agents thereupon agreed to employ Hamilton and Samuel Jones to "compleat the said Brief with as much expedition as possible . . . ." (572) Jones apparently spent 24 days examining records and collecting evidence, plus 12 more in drafting a brief, unfortunately not found by the editors; Hamilton spent 35 days drawing his own brief. Included in the printed documents are an extract from Duane's brief, with marginal notations by Hamilton; the latter's notes on the history of South and North America, as well as his part of a brief for the argument in the case; and also the Massachusetts brief, together with a letter from James Sullivan as to the settlement of the controversy. Again Hamilton's thoroughness as a lawyer is disclosed. The Connecticut Gore controversy, ten years after the western lands dispute, is likewise well introduced by the editors. Hamilton's participation is somewhat limited, but the documents in which his activities and arguments are found are printed in full. This portion of the volume may be felt to be somewhat weak, insofar as Hamilton's participation is concerned, but this is because of the lack of documentary evidence.

The final portion of this first volume is devoted to Hamilton's participation in criminal cases. The editors' introduction concludes, after discussing the criminal cases briefly, that "none of the cases accounted for above was of much consequence—except to the defendants. . . ."(692) The two cases which are given at length, with separate and lengthy introductions, are the Manhattan well mystery, and the Croswell criminal libel trial. In the former Hamilton was associated, although at odds politically, with Aaron Burr and Brockholst Livingston (this latter thereafter sat as one of the Justices when

Hamilton argued the *Croswell* case), and this trial may well be one of the first post-Revolutionary efforts to report a criminal trial verbatim. According to the Goebels, the probabilities are that there was "a sharing of the burdens of examining and cross-examining the witnesses" by the three attorneys (695). Since the "minutes" of the trial do not disclose much of who examined or cross-examined, or who objected or otherwise argued, there is conjecture which must enter any conclusion as to Hamilton's participation and effectiveness.[16] However, at the conclusion of the examination of witnesses, Burr read to the jury passages from Hale's Pleas of the Crown (771), after which the Assistant Attorney-General's request for an adjournment was denied, Chief Justice Lansing charged the jury, and they "returned in about five minutes with a verdict—Not Guilty." (773-774) The editors, however, refer to the New York Daily Advertiser of April 3, 1800, which states that Hamilton, after the motion for adjournment was made, "rose and observed that the case was too plain to require any 'laboured elucidation'—he was willing to rest the case on the recital of the facts as summed up by the court. This was assented to. . . ." (704)

The case involving Harry Croswell, indicted for criminal libel, completes this first volume. Whether it should begin, and thereby whet one's appetite for the rest of the volume, or, as it does, conclude, and thereby whet one's appetite for the volume to come, is arguable; the fact is that when the *Croswell* case is read one drools for the forthcoming volume. For despite what the Goebels say, as just quoted at the outset of the preceding paragraph, and despite the fact that Hamilton may have been influenced by his politics in accepting the assignment to argue the *Croswell* "appeal," the fact is that the *Zenger* case but a few years prior did not make New York law, or law for the country, in this area of political free speech; as the Goebels conclude, "Croswell's case and Hamilton's part in it were destined to leave a mark upon the constitutional history of New York uneradicated to this day." (846) Briefly, for the case has been discussed by this writer elsewhere,[17] the politicking at the turn of the century found pamphleteering and editorializing in (weekly) journals going full blast; the language was also somewhat earthy or, at the least, not too polite. For articles in his weekly journal of August 12, 1802, and September 9, 1802, Croswell was indicted on January 10, 1803, for a (public) libel upon Jefferson and the Republicans; the Federalists now rallied to his defense. The trial was begun on July 11, 1803, before a jury,

16. For example, the "transcript" shows a "Quest. by Counsel for Prisoner," or a "Quest. by the assistant att'y. Gen." (765), or one "by P's Counsel" (768), but nothing directly attributing much to a particular attorney.

17. See Forkosch, *Freedom of the Press: Croswell's Case*, 33 FORDHAM L.REV. 415 (1965).

and Croswell was found guilty; however, a motion for a new trial was made, and this was argued the following February before the Supreme Court at Albany, the state's capital. The core of the defense, and the heart of the motion ("appeal"), was that Croswell should be able to introduce truth as justification where a public figure was libelled, and that the jury should decide all matters of fact and of law. The trial justice (Chief Justice Lewis, who also presided on the motion's argument) had rejected this defense against the plea of Croswell's attorneys that such an alleged common law doctrine of libel was repugnant to New York's constitution, was abrogated by the reception clause therein and that it was destructive of the freedom of the press. Now, for Albany, Hamilton was called upon, and he responded with an impassioned plea, running for six hours and which, according to the future Chancellor Kent of *Commentary* fame (who sat as one of the judges), "He digresses here into a most masterly & eloquent digression in favor of giving the Truth in Ev. to public rights & the Liberties of the People . . . ." (836) As background for Hamilton's oral argument the Goebels present a condensation of the facts and background which again must be praised unstintingly. Against this frame the (allegedly) verbatim acounts of the oral arguments of the participants on the motion are given, and Hamilton's running for twenty-five pages (808-833), should be required reading for law-school freshmen. While the (political) result of the judicial "appeal" was disappointing, the practical results were not, and the legal results were an ultimate victory. The four Justices were equally divided, so that Croswell escaped punishment here. But the legislature, the following year, enacted a law, still the law today in New York, which embraced substantially all portions of the Hamiltonian argument.[18] It can thus be said that Hamilton and his co-counsel did contribute to the law of criminal libel, and even unto the present day.[19]

A comment in conclusion. The preceding may well be taken as a "rave" review, and so it is. More importantly, however, the present economics of publishing makes almost mandatory some form of financial grant from a fund or foundation. If volumes such as these can emerge from a partnership such as this, then donors should not hesitate to support additional like and related

18. The original law is given at p. 846 n.124, and is today found in New York's Penal Law Art. 126. It is not meant to ascribe this legislative victory solely or even primarily to Hamilton; factually, the defense arguments had been urged at the 1803 trial, but Hamilton's re-casting and oral eloquence (the legislature is said to have attended *en masse* at the argument), certainly were of importance. It may be said, William Van Ness, one of Croswell's lawyers from the start and the assemblyman who introduced the bill, may well be (more) responsible than Hamilton for all that has here been written. Evidence, however, is lacking, a need which is here, as elsewhere felt and should be filled.

19. See New York Times v. Sullivan, 376 U.S. 254 (1964).

volumes for other figures in our legal past. Our history and our legal heritage should not be list as papers dry and documents fade.

MORRIS D. FORKOSCH*

* Professor of Law, Brooklyn Law School, B.A., 1936; M.A., 1938, New York University; Ph.D., 1952, New York School for Social Research; LL.B., 1930; LL.M., 1932, St. John's University; J.S.D., 1948, New York University; (Director American Society for Legal History).